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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 625

THE HARTFORD FIRE INSURANCE COMPANY,
PETITIONER,

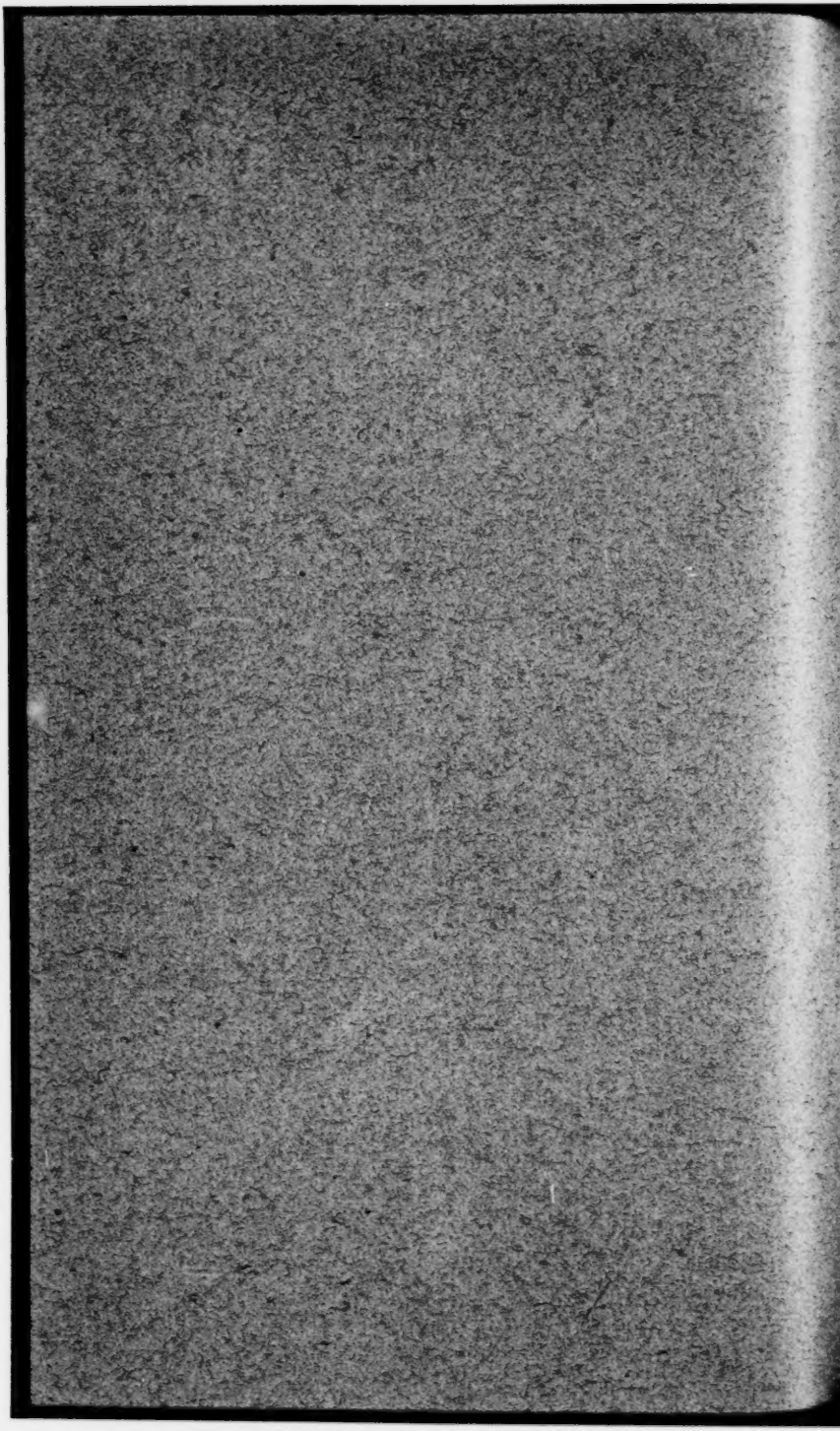
vs.

ALBERT A. WILSON AND JOHN B. LARNER,
TRUSTEES, RESPONDENTS.

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

SAMUEL B. PAUL,
ALEXANDER WOLF,
Attorneys for Petitioner.

LAW REPORTER PRINT.



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TRUSTEES, RESPONDENTS.

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Now comes the Hartford Fire Insurance Company, the petitioner above named, and respectfully prays for a writ of certiorari to the Court of Appeals of the District of Columbia, requiring the above cause to be certified to this court for review and determination, and represents:

I.

That it is a fire insurance corporation duly incorporated under the laws of the State of Connecticut and doing business in the District of Columbia.

II.

That the respondents, Albert A. Wilson and John B. Larner, are citizens of the United States and residents of the District of Columbia.

III.

That heretofore, to wit, on November 12, 1895, your petitioner was made defendant in a suit at law in the Supreme Court of the District of Columbia, in which Albert A. Wilson and John B. Larner, as trustees, were the plaintiffs, said suit being for the alleged non-payment of certain insurance policies alleged to have been issued and delivered by your petitioner to said Wilson and Larner, trustees, as aforesaid; that to the said declaration your petitioner pleaded the general issue, and issue was joined thereon.

IV.

That thereafter, to wit, June 15, 1898, the parties hereto stipulated to submit the said cause upon the following agreed case:

1. Prior to April 17, 1895, C. C. Duncanson, treasurer of the Ivy City Brick Company of the city of Washington, D. C., authorized the firm of Tyler & Rutherford, of said city, at their request, to place insurance for the company, loss, if any, payable to Albert A. Wilson, et al, trustees under a deed of trust given by said company, as interest might appear, said Duncanson averring the amount to be placed to be the sum of ten thousand dollars ($10,000.00), and Tyler & Rutherford averring a much larger sum.

On said April 17, 1895, said Tyler & Rutherford, under the aforesaid authority, proposed to one Barrett, an agent, at said city of Washington, of the Hartford Fire Insurance Company, of Hartford, Connecticut, for insurance on properties of the said Ivy City Brick Company.

2. Said Barrett stated to said Tyler & Rutherford that the proposed risk was a special hazard, and that he doubted his authority to accept it before reference to his principal, but that he would issue the
12 policies amounting to $2,000, equally divided on the baildings and machinery, upon the condition that the same should be held by the said

Tyler and Rutherford, and not delivered to their principals until the decision of the Hartford Fire Insurance Company on the acceptance of the risk was duly had, and should be subject to immediate cancellation (the five days' notice in the policy conditions being waived) by notice that said company rejected the risk.

3. This condition was accepted by said Tyler & Rutherford, and the two policies of insurance in the declaration set forth were thereupon written and and placed in their hands.

4. A short time thereafter, to wit, on the 27th day of April ensuing, on the first inspection visit to Washington after the issue of said policies, William R. Royce, the special agent of the Hartford Fire Insurance Company, known by said Tyler & Rutherford to be the representative of the company, having authority to inspect, confirm, or cancel risks for and in behalf of said company, went to the office of said Tyler & Rutherford and informed them that the Hartford Fire Insurance Company refused to carry the risk and ordered the cancellation of the said policies, and on the same day the said Barrett, being on his way to the office of Tyler & Rutherford, met R. K. Tyler, a member of that firm, who had made the negotiation for the policies, had the same in his custody, and had the exclusive charge of the matter, and announced to him that the company ordered their cancellation; to which the said Tyler responded, "All right; send up and get them."

5. The said Barrett sent three times to the office of Tyler & Rutherford for the policies, each time his employer was informed by one of the clerks
13 of Tyler & Rutherford that Mr. R. K. Tyler, who had charge of the policies, was absent from the office, and they would have to see him.

6. Said Barrett was taken sick and did not appear at his office for some days, but had immediately ordered the entry clerk to make the customary entry in such cases on the register where the policies were noted, "Cancelled by order of company," which was accordingly done.

7. On the first day of May ensuing, the customary

mutual accounts of business between the offices of said Barrett and said Tyler & Rutherford were settled, and the two policies were treated as dead, no charge for their premiums being presented on the one hand or asked for on the other.

(MEM.—Of the facts recited in the second clause of paragraph 1 and in paragraphs 2, 3, 4, 5, 6 and 7 above set forth, no party connected with or interested by mortgage or otherwise in the Ivy City Brick Company had any knowledge until after the fire occurred.)

8. The existence of the two policies was never reported to the said Duncanson nor to anyone connected with the Ivy City Brick Company by mortgage or otherwise, nor did he or they have any knowledge of or connection with said policies until they came into the hands of said Duncanson on May 16th, 1895, and at no time prior to the fire had any party connected with or interested by mortgage or otherwise in the Ivy City Brick Company any knowledge of the transaction between said Barrett and said Tyler & Rutherford hereinbefore set forth.

9. The two policies had been overlooked by Tyler & Rutherford and lay in the drawer along
14 with a number of other policies issued by other insurance companies which had been secured by said Tyler & Rutherford for the purpose of filling the above order. Of this fact no one connected with the Ivy City Brick Company in any interest whatever was informed until after the fire.

10. Tyler & Rutherford had found great difficulty in procuring the desired insurance, and aver that the entire amount proposed was never secured. Some of the agencies insisted on the same conditions as to cancelations as those fixed between said Barrett and said Tyler & Rutherford, and cancellations by orders of the different companies were so frequent that said Tyler & Rutherford could not at any time before May 16th know how much of binding insurance was in hand. Of all these facts the said R. K. Tyler avers that he informed the said Duncanson in the progress of the effort to secure insurance, and some time prior to the fire. The said Duncanson denies

that he had any information as to any of these facts at any time prior to the fire, except the fact that there was difficulty in procuring the desired insurance. No specific mention, however, of the two policies of the defendant was made to said Duncanson or any one connected in any interest with the Ivy City Brick Company.

11. On the 16th day of May, 1895, a clerk of Tyler & Rutherford was directed to make up the account of the policies on hand and put them in a package for delivery. The two policies of the Hartford Fire Insurance Company, which had been overlooked and were then lying in the same drawer
15 with the other policies, taken in fulfillment of this order, were included in the account and placed in the package with said other policies by said clerk of Tyler & Rutherford without the personal knowledge of said Tyler & Rutherford, and both were handed to said Duncanson by said R. K. Tyler, said Tyler not examining the same. Said Duncanson took the package and engaged to pay the account on the Monday week following, to wit, May 27, 1895.

12. On the morning of May 17th, after the fire, which occurred about one o'clock A. M. on that day, said R. K. Tyler came to said Duncanson and asked for the return of the two policies, stating that they had been handed him by mistake and the fact of their previous cancellation, said Tyler averring that he did not know that the property described as insured had been destroyed. Later, on that day, when the fact was known that the property described in the policies was destroyed, Tyler & Rutherford, by telephone, informed the Washington Loan & Trust Company, the beneficiary of the trust held by Wilson et al., trustees, that the Hartford policies had been delivered by mistake and requested it to send back the two policies, and were answered that they were locked up, but would be returned the next morning.

Of this request and answer by the telephone it is agreed that the Ivy City Brick Company knew nothing at the time, and when informed of said request directed that the policies be not returned. The policies were not returned and sundry corres-

pondence followed between said Tyler & Rutherford, said Duncanson, and the Washington Loan & Trust Company, in the course of which said Duncanson sent a check to Tyler & Rutherford for the settlement of the account above referred to. Tyler & Rutherford refused said settlement, stating that the two policies of the Hartford were void and had been sent in by mistake, and returned the check, with a corrected account, excluding these policies. The correspondence between said Duncanson, said Tyler & Rutherford and said Washington Loan & Trust Company and the policies sued on may be filed with this statement and considered as part of this agreed case.

13. Defendant waives any claim of laches or irregularity as to notice of loss, or as to the particular account commonly called proof of loss.

14. The parties hereto reserve the right to except to the rulings of the court on the aforesaid agreed case. The court shall be considered as having directed the jury to find a verdict in favor of the party for whom the court itself shall find in accordance with the stipulation following, and either party hereto shall be considered as having filed an objection to such ruling or rulings of the court and having duly taken exception thereto, the said party so excepting shall be allowed an appeal thereon to the Court of Appeals, and this agreed case shall be filed in the said court as the proper bill of exceptions herein.

On the above state of facts it is agreed that should the court find for the plaintiff judgment shall enter for $2,000, with interest from October 7, 1895, and costs.

And should the court find for the defendant, judgment shall enter for the defendant, with costs.

The correspondence and the policies sued on referred to in paragraph 15 of said agreed case, will be found on pages 10, 11, 12, 13 and 14 of the transcript of record, and pages 1, 2, 3, 4, 5 and 6 of the addition to record, both herewith submitted.

V.

That this action came on to be heard upon said agreed case before Mr. Justice Bradley holding the Supreme Court of the District of Columbia, who being of opinion that the plaintiffs were not entitled to recover, rendered judgment in favor of your petitioner. The opinion of Bradley, J., is attached hereto and prayed to be made part hereof.

VI.

That from the judgment of said court in favor of your petitioner an appeal was prosecuted to the Court of Appeals of the District of Columbia, which said court on the 12th day of June, A. D. 1900, by a majority opinion (Justices Morris and Shepard), Chief Justice Alvey dissenting, reversed the judgment of the Supreme Court of the District of Columbia, and held that the plaintiffs were entitled to recover upon said policies.

That the principles involved in the decision are of far greater importance than the amount of money. In effect the majority of the Court of Appeals proclaim that *the delivery* of a policy of insurance should be placed upon different rules of law from those governing the delivery of other instruments of contract.

That a motion for rehearing was granted and a rehearing had, which resulted in the adherence of the court to its original decision, Chief Justice Alvey dissenting as before. The opinion of the majority of the Court of Appeals through Shepard, A. J., and the dissenting opinion of Alvey, C. J. are attached hereto and prayed to be part hereof, and the briefs of counsel are filed herewith.

VII.

Your petitioner respectfully represents: That the controversy in this case arises from a conditional delivery of two policies of insurance under an agreement between Tyler &

Rutherford, agents of the respondents, and Barrett, an agent of your petitioner; the rejection in a reasonable time of the risk as provided in said agreement; the acceptance of said rejection by said Tyler & Rutherford, and their consent to the return of the policies; a settlement between the respective agents that no premium was due in the premises—*all long before the respondents ever knew or heard of the existence of the policies and whilst the right of Tyler & Rutherford to negotiate for insurance was in their full control*; the accidental retention of the policies in the hands of Tyler & Rutherford, and their coming by accident into the hands of the respondents a few hours before the fire; all of which is clearly and concisely set forth in the "Agreed Case."

For a *first assignment of error*, your petitioner cites from the opinion of the majority of the Court of Appeals the following:

> "Our conclusion is that by reason of the nature and terms of the policies, it is not competent to show their delivery to the insured upon a verbal condition; making their existence as contracts depend upon the subsequent ratification of another agent.'

This court, in the case of Burke *vs.* Dulaney, 153 U. S. 228, held:

> "The nominal delivery of an instrument may always be proved to be on a condition which has not been fulfilled in order to avoid its effect."

This is not to show any modification or alteration of the written agreement, but that it never became operative, and that its obligations never commenced. Evidence of such an oral agreement would show that the contingency never happened and would not be in contradiction of the writing. It would prove that there never was any concluded, binding contract entitling the party who claimed the benefit of it to enforce its stipulations. The said Court of Appeals by a majority of the

court, in their opinion reversing the decision of the court below, admitted this to be the law, but they attempt to make this case an exception to the general rule on account of certain stipulations and conditions in the policies, thus putting the conditions of contracts in effect before they become contracts at all by final delivery. This is in direct violation of all authorities, the rule being that the provisions in an instrument relate to the instrument itself after it becomes a living and existing contract between the parties and only then. These policies were never in effect but awaited the performance of the condition precedent before any of the conditions or stipulations contained in them became operative. The majority of the Court of Appeals admit that they find no authorities to support their opinion. It rests upon the conclusion that policies of insurance do not come under the broad rule laid down in Burke *vs.* Dulaney, which covers the "*nominal delivery of an instrument*," ignoring or annulling the specific decisions of the Court of Appeals of New York in the important case of Hanickell *vs.* The New York Life Insurance Company, 111 N. Y. 399, and the New Jersey Court of Errors in Millville Mutual Insurance Company *vs.* Collard, 38 N. J. 480, both of which distinctly apply the rule to policies of insurance.

Justice Peckham, delivering the opinion in the Hannickell case, says:

> "*This, we think, was clearly a condition precedent* to the full delivery and acceptance *of these policies* issued by the defendant, *and until such condition precedent was complied with or waived, no fully executed and valid contract of insurance* existed between these parties.
>
> "No question of the right to *conditionally receive an instrument*, not under seal, by a party thereto can be successfully raised. Benton *vs.* Martin, 58 N. Y. 570, decides this proposition, and leaves it unnecessary for us to discuss the abstract question.
>
> "*The provisions in the policies themselves which are above quoted relate to the policies themselves after they should become executed instruments between these parties.*"

On examination of the record, herewith submitted, it will appear that Mr. Justice Bradley, of the Supreme Court of the District of Columbia, in his opinion, and Mr. Chief Justice Alvey, of the Court of Appeals, dissenting from the majority of the opinion of that court, agreed with your petitioner in holding that this condition precedent was a valid condition; that the policies went into the hands of the respondents upon mistake of fact, and were never delivered as present contracts unconditionally, and that the respondents were not entitled to recover.

Mr. Justice Alvey in his dissenting opinion on this question says:

> "The contention that because the policy contains the provision that 'this policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon, or added thereto, and no officer, agent or other representative of the company shall have the power to waive any provision or condition of this policy except such,' etc.; therefore parol evidence is not admissible to show the circumstances under which the policies were written and placed in the hands of the insurance brokers, to be retained by them until further notice as to whether the risk was accepted; because, as contended, such evidence would vary or alter the terms and conditions of the policy, can not for a moment be supported. Such contention simply begs the whole question. It assumes that the risk had been accepted by the defendant company, and that the policies had been delivered to the plaintiffs, or their agents, as completed contracts. That is the very question in dispute. Until the policies were in fact issued and delivered, as executed contracts, the terms and conditions contained in them could have no operative effect whatever. This would seem to be well settled beyond question.
>
> "The question whether a contract has been delivered or accepted or not is always one of a preliminary character, that arises in advance of questions as to the construction of the contract itself, and most generally it is one that depends upon parol evidence

> for its determination. Therefore, whether an instrument sued upon, being either deed or simple contract, policy of insurance, or other written instrument, came into the hands of the plaintiff without *any absolute and final delivery* by the party sought to be charged thereby is a question upon which parol evidence is always admissible. And where an instrument is signed with an understanding that it is not to be delivered except upon the performance of a certain condition, or upon the happening of a certain event or contingency, this may be shown by parol, in avoidance of the effect of the instrument."

In this case Tyler & Rutherford had, in effect, surrendered the policies to the petitioner, as will appear from paragraph 4 of the agreed case (page 2 of the Record herewith submitted), and the delivery to the respondents was due entirely to the mistake of a clerk of the said Tyler & Rutherford. Such delivery upon said mistake of fact could in no sense convey to the respondents any rights under said policies, nor could such delivery impose upon your petitioner any liabilities or obligations. It is a general rule of law that where an instrument is delivered upon mistake of fact, its delivery is annulled, and that no rights or obligations can accrue thereunder.

Your petitioner as a *Second assignment of error* by the majority of the Court of Appeals, insists that the court erred in rejecting the contention of your petitioner: That, *even if the policies were in force as a temporary protection to the respondent, they were dead by effective cancellation according to their distinct terms and conditions, and had been in effect abandoned to your petitioner long before they by accident went into the hands of the respondent.* In support of this contention your petitioner begs leave to refer to its brief before the Court of Appeals herewith filed and made a part of this petition.

Your petitioner begs leave further to invite the attention

of this court to conclusions of fact in the opinion of the court which are wholly irreconcilable with the facts set forth in the agreed statement as set out in the record. These errors appear in almost every paragraph of the opinion. One conspicuous instance, largely affecting the conclusion reached, is the following in section 4 of the opinion of the court:

> "From the terms of the agreed statement it appears: That the local agent of the insurer, who was possessed of signed policies and authorized to fill the blanks, deliver them, and bind his principal thereby, regarded the policies as in force, at least, until disapproved by the company, and therefore subject to the reserved power of cancellation notwithstanding the conditional delivery hereafter to be considered separately."

From the Agreed statement, paragraph 7, it appears:

> "On the first day of May ensuing, the customary mutual accounts of business between the offices of said Barrett and said Tyler & Rutherford were settled, and the two policies were treated as dead, no charge for their premiums being presented on the one hand or asked for on the other."

The sole basis of the suggestion that the agent regarded the policies as in force is what, with due respect, we think a very superficial view of the meaning of a phrase in the second paragraph of the agreed case.

A rule of interpretation is to give such meaning to a phrase if possible as will make it consistent with its surroundings and the concurrent acts of parties. And the only meaning consistent with the context and conduct of the parties possible to the phrase "and should be subject to immediate concellation (the five days' notice in the policy conditions being waived)," was, that it should be given up to be bodily destroyed, and that the text of the instrument should not affect this.

Had the agent of your petitioner or the agent of respondents regarded the policies as in force from the time they were lodged in the hands of Tyler & Rutherford to the time when the rejection of the risk was announced, *there would certainly have been pro rata premium due for the* temporary risk carried.

It distinctly appears in the record that neither party regarded such pro rata premium as due. This contemporaneous action by both parties completely negatives the suggestion that the policies were in force in the interim and settles the fact that neither of the negotiating parties thought them to have been in force.

It also shows that no consideration for any such supposed liability existed or was contemplated, and therefore no contract could have existed, because contract is not binding without consideration.

The statement by the court:

> "There is nothing in the agreed statement to warrant the conclusion that the brokers' agency or employment extended any further than the procurement of the policies,"

is not borne out by the agreed statement which clearly shows that the authority given to said Tyler & Rutherford was to procure insurance, and surely it was competent for them to make a binding arrangement for themselves by which they could bargain for insurance to take effect only if and when the insurance company approved.

The court also stated:

> "Merely permitting the policies to remain for a time and uncalled for, in the hands of the brokers, which is all that this record discloses, is perfectly consistent with the idea of the termination of their agency."

The record discloses that the policies went into the hands of Tyler & Rutherford and remained there with a distinct

agreement that no delivery was to be made to their principal until the risk was accepted by the company.

A further statement of the court:

> "With the receipt of the policy a new relation is created between the insured and the broker, namely, that of depositor and depositary; the possession of the broker becomes, in law, the possession of the insured and nothing more."

It is clearly shown from the agreed statement that there was no receipt of the policies as a concluded binding contract. The general trend of the court in its opinion epitomizing the agreed case may be observed by comparing paragraph nine (9) of the opinion with paragraph nine (9) of the agreed case and paragraph ten (10) of the opinion with paragraph eleven (11) of the agreed case.

Your petitioner therefore respectfully prays that the writ of certiorari may be issued to the Court of Appeals of the District of Columbia to bring this cause to this court for review and determination.

HARTFORD FIRE INSC. CO.,
[SEAL] By P. C. ROYCE, *Secy.*

SAMUEL B. PAUL,
ALEXANDER WOLF,
Counsel for Petitioner.

CITY OF HARTFORD, }
State of Conn. } ss:

I, P. C. Royce, sec'y, of the Hartford Fire Insurance Company, corporation, do solemnly swear that I have read the foregoing petition by me subscribed, that I know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

P. C. ROYCE, *Sec'y,*
Hartford Fire Insc. Co.

Subscribed and sworn to before me this 26th day of March, 1901.

E. E. MARVIN,
U. S. Commissioner.

[SEAL]

We hereby certify that we have examined the foregoing petition, and in our opinion it is well founded, and that the prayers of your petitioner should be granted.

SAM'L B. PAUL,
ALEXANDER WOLF,
Counsel for Petitioner.

Messrs. BLAIR & THOM,
Attorneys for Albert A. Wilson and John B. Larner, Trustees:

Please take notice that we shall, on Monday, April the 8th next, at the opening of the court, or as soon thereafter as counsel can be heard, submit a motion to the Supreme Court of the United States upon the petition here filed to remove the whole record and cause to said court.

SAMUEL B. PAUL,
ALEXANDER WOLF,
Attorneys for Petitioner.

APPENDIX.

The Full Text of the Opinion of Bradley, J., is as Follows:

THE COURT: This is an action upon two policies of insurance. The instruments sued on are simple contracts. The case has been submitted upon an agreed statement of facts, by which it appears that the local agent of the defendant company was applied to by the firm of Tyler & Rutherford, as agents of the Ivy City Brick Company, who received their authority from C. C. Duncanson, treasurer of that company, to procure insurance upon the buildings and machinery of the Ivy City Brick Company. Barrett, the agent of the defendant, when the application was made to him, stated that this was an extremely and unusually hazardous risk, and that he doubted his authority to accept the risk without first communicating with his principal, the defendant; but that he would issue a policy for $1,000 on the buildings, and another policy for the same amount on the machinery, and put them in the hands of Tyler & Rutherford, upon the condition that Tyler & Rutherford should hold them, and should not deliver them to their principal, until the defendant had been communicated with, and had had an opportunity to express its assent or dissent. The policies are in the ordinary form, with the names of all the officers lithographed upon them, and needed only to be countersigned by the local agent and issued to make them operative.

Tyler & Rutherford accepted these conditions, took the policies, and retained them from the 17th day of April, 1895, the day of their date. On the 27th day of the same month, a special agent of the company, having authority to act in the premises, being in the city, went to the office of Tyler & Rutherford, and informed them that his company would not carry the risk. On the same day the local agent, Barrett, saw Mr. Tyler on the street, and informed him that his company would not accept or carry the risk, and wanted

the policies canceled. Tyler replied to him, "All right; send up and get them." Barrett sent several times to Tyler's office; his messenger not finding Tyler in, was informed by a clerk that he could not deliver the policies unless Mr. Tyler were there personally to direct it.

On the 16th day of May, 1895, the policies were delivered, by mistake of a clerk, with other policies in the hands of Tyler & Rutherford to C. C. Duncanson, treasurer of the Ivy City Brick Machine Company. Duncanson had no prior knowledge of their existence or of the conditions under which Tyler & Rutherford held them. On the night of that same day, or on the morning of the 17th of May, a fire occurred; and on the 17th Duncanson was informed by Tyler & Rutherford by note (they being ignorant of the fact that a fire had occurred, the fire having occurred early that that morning) that these policies had been canceled and recalled; that they had been treated as dead; that they had been delivered by mistake and he was asked to return them. After that information Duncason sought to pay the premiums upon these policies, embodying the amount in a check to Tyler & Rutherford that covered the amount of the premiums upon all the policies that had been delivered to him. Tyler & Rutherford refused to accept that check, stating that the two Hartford policies were void and had been sent in by mistake. In a settlement of mutual accounts between Tyler & Rutherford and Barrett on the first day of May, 1895, the premiums upon these policies did not enter. No premium was demanded on the one side and no premium was paid on the other. The items were entirely omitted from the account and the policies were treated as dead.

In response to Tyler & Rutherford's request for the return of these policies, the were informed by the officers of the Washington Loan & Trust Company, the beneficiary under the deed of trust in which the plaintiffs are trustees, at first, that the policies would be returned, but subse-

quently, that the Ivy City Brick Machine Company declined to permit or authorize their return; and the trustees named in the deed of trust mentioned subsequently brought this action.

By the agreed statement of facts it is stipulated that, if the plaintiffs are entitled to recover at all upon these policies (no question being made as to the plaintiffs' right as against that of the Ivy City Brick Machine Company, it being the assured), judgment may be entered in favor of the plaintiffs for the full amount of the policies, with interest from October 7, 1895, and costs; but that if the plaintiffs are not entitled to recover, judgment shall be entered for the defendant with costs.

At the hearing, the argument was principally addressed to the question, whether the policies having been delivered to Tyler & Rutherford and having taken effect, they could be subsequently canceled by the act of the defendant, through its agent, with the consent of Tyler & Rutherford. It was contended for the plaintiffs that Tyler & Rutherford, being the agents of the assured only for the purpose of securing the policies, were not agents for any other purpose, and that they could not, by their consent to the cancelation of the policies, bind the assured. On the other hand, it was urged in behalf of the defendant that Tyler & Rutherford were not only the agents for the purpose of procuring the policies, but agents in a much broader sense, and that they were possessed of ample authority to consent to their cancelation. It was also contended that the policies never became binding contracts, because never delivered.

The question of delivery appears to be the primary and main question in the case; for unless these instruments were made effective by delivery, the other question of the power of the agents of the assured to bind their principal by consenting to their cancelation or revocation need not be considered. Delivery, actual or constructive, is essential to perfect the existence of a written contract. In the case of these policies, delivery in some form was necessary to

complete the contracts between the parties. A manual turning over of the instrument is not always essential. There may be a delivery in a legal sense without manual tradition; and there may be manual tradition under conditions precedent that prevent the act from becoming a delivery in a legal sense until the conditions are performed.

It appears by the agreed statement of facts, that these policies were put in the hands of Tyler & Rutherford upon the express condition that they should not be delivered to their principals, so as to make them operative and give them force and effect as contracts between the parties, until the defendant company had been communicated with, and had signified its assent; and that upon the signification of its dissent, the policies should be "canceled." While the word "canceled" is used, it is evident that the understanding of the agents of both parties was that without such assent the policies should be void, and should be surrendered to the agent of the defendant.

It seems to me that the question is without difficulty, that a delivery to Tyler & Rutherford, under these circumstances, although they were the agents of the assured, was not a delivery in law. The custody intrusted to them was a custody that was to cease upon notice to them that the company would not carry the risk; and upon the happening of that event, all right to possession in Tyler & Rutherford terminated, and it became their duty to surrender the policies to the defendant or its agent. The delivery to Duncanson conferred no right or title to or upon the Ivy City Brick Company, or the plaintiffs. In cases where negotiable instruments have been delivered to an immediate party, or his agent upon conditions precedent, it has been held by high authority that the title did not pass until the performance of the conditions.

Quebec Bank of Toronto *vs.* Hellman, 110 U. S. 178.
Belleville Bank *vs.* Borneman, 124 Ills. 205.
Merchants' Exchange Bank *vs.* Luckow, 37 Minn. 542.
Benton *vs.* Martin, 52 N. Y. 570.

In Quebec Bank *vs.* Hellman, the note in suit was an accommodation note made by the defendants to Bacon & Co., and by them manually delivered to the Merchants' National Bank at Cincinnati, the agent of the plaintiff, upon the condition that either the note or its proceeds should be credited upon a claim held by the plaintiff against Bacon & Co. This condition was not performed. It was held that "under such circumstances, without the performance of the condition, there is no delivery in the commercial sense and no title passes."

In Benton *vs.* Martin, a sight draft drawn by the defendant, and given by him to the plaintiff, was lost before presentment. Subsequently, and before the maturity of the original, on application of the plaintiff, defendant executed another, an exact copy of the first, with the word "duplicate" written across it. He delivered this to the plaintiff upon the condition that he would not be responsible for any back laches, and that the new draft was simply to take the place of the original. This duplicate was retained one day at the request of defendant, and was then forwarded and presented for payment, and payment was refused, the drawees having failed the previous day. At all times, up to the time of the failure, defendant had funds to meet the draft in the hands of the drawees. Action was brought upon the duplicate, and the trial court directed a verdict for the defendant because of back laches. The Court of Appeals held that "instruments not under seal may be delivered to the one to whom on their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions the observance of which is essential to their validity, and the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties to it or others having notice. It needs a delivery to make the obligation operative at all, and the effect of the delivery and the extent of the operation of the instrument

may be limited by the conditions with which the delivery is made."

The same principle has been applied to the delivery of policies of insurance.

Where policies of life insurance had been manually delivered to the assured, and he had delivered to the agent of the insurance company securities representing the amount of the premium, but subject to certain conditions to be performed by the agent which were not performed, the assured was allowed to recover the securities in an action, it being held that the conditions were precedent to the full delivery and acceptance by him and the taking effect of the contract.

Hainickell *vs.* N. J. Life Ins. Co., 111 N. Y. 390.

Where an agent made out a policy of fire insurance and placed it in the hands of a third party until it could be ascertained whether the insurance company would accept the risk, and the company refused it, it was held, that there was no delivery, although the agent had previously received the premium.

Brown *vs.* American Cent. Ins. Co., 70 Iowa, 390.

Under the agreed statement of facts, I am of opinion that these policies never took effect, and that, therefore, the plaintiffs are not entitled to recover. Judgment must be entered up for the defendant, with costs.

Opinion of the Majority of the Court of Appeals.

Mr. Justice Shepard delivered the opinion of the Court:

This suit was brought by Albert A. Wilson and John B. Larner, trustees, upon two policies of insurance covering $1,000 on certain buildings and $1,000 on machinery of the Ivy City Brick Company for one year from April 17,

1895. Both policies were made payable to said trustees as their interest may appear.

The policies are simple contracts of the standard form, two of the stipulations of which, only, are of any importance in the determination of the case. These are: (1) "This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancelation. (2) This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have the power to waive any provision or condition of this policy except such as by the terms of this policy may be subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

An agreed statement was made of the facts that each party could prove, and with a reservation of the right of exception to all rulings of the court made thereon, the case was thereon submitted, and judgment was entered for the defendant.

2. From the agreed statement it appears:

(1) That Tyler & Rutherford, insurance brokers, were requested by the Ivy City Brick Company to obtain insurance upon its property for the sum of $10,000; and that they applied to Barrett, the local agent of defendant at Washington, for policies covering $2,000 of the risk.

(2) Said Barret stated to said Tyler & Rutherford that the proposed risk was a special hazard, and that he doubted his authority to accept it before reference to his principal,

but that he would issue policies amounting to $2,000, equally divided on the buildings and machinery, upon the condition that the same should be held by the said Tyler & Rutherford, and not delivered to their principals until the decision of the Hartford Fire Insurance Company on the acceptance of the risk was duly had, and should be subject to immediate cancelation (the 5-days' notice in the policy conditions being waived) by notice that said company rejected the risk.

(3) This condition was accepted by said Tyler & Rutherford, and the two policies of insurance in the declaration set forth were thereupon written and placed in their hands.

(4) On April 27, 1895—ten days after the delivery of the policies aforesaid—defendant's special agent came to Washington and informed Tyler & Rutherford that defendant "refused to carry the risk and ordered the cancelation of said policies." On the same day Barrett met Tyler—who had negotiated the insurance and had the policies—and notified him that the defendant ordered their cancelation. Tyler responded: "All right; send up and get them."

(5) Barrett sent three times to Tyler & Rutherford for the policies but did not obtain them, because, as his messenger was informed, Tyler, who had charge of the policies, was absent and would have to be seen.

(6) Barrett became ill and did not appear at his office for some days; but he had immediately ordered his entry clerk to note on the register of these policies: "Canceled by order of company." And this was done, but the date does not appear.

(7) On May 1, according to custom, accounts between Barrett and Tyler & Rutherford were settled, but no charge for premiums was presented or made; the policies being treated as dead.

(8) The existence of the policies was not made known to the insured or anyone interested therefor until May 16, 1895, when it became possessed of them. Nor had the insured any knowledge of the transactions between Barrett and Tyler & Rutherford.

(9) The policies, until May 16, 1895, remained in the office of Tyler & Rutherford along with some other policies that had been obtained under the original order.

(10) On May 16, 1895, a clerk of Tyler & Rutherford was ordered by them to make up the account for premiums due on the policies obtained for the Brick Company and put them in a package for delivery. The package, including the policies sued on, was handed, with the account, to Tyler by the representative of the Brick Company; but Tyler did not examine the package and did not know that the policies were inclosed.

(11) The account included the premium charges for the two policies. The Brick Company's representative received the package and engaged to pay the account on May 27, 1895.

(12) On May 17, 1895, the property was destroyed by fire. On the same day, and after the fire, Tyler, averring that he did not know the property had been destroyed, demanded the return of the two policies of the party to whom he had delivered them, stating that they had been canceled and that he had delivered them by mistake. Later, on the same day, Tyler & Rutherford gave the same notice and made the same demand of the representative of the beneficiaries of the trust.

(13) The Brick Company directed the holding of the policies; and sent a check to Tyler & Rutherford for the amount of the account rendered, including the premiums on these two policies. They refused to receive the money for the premiums on these policies, declaring that they were void and had been delivered by mistake, and made up and transmitted a new account for premiums due, omitting these.

3. No question has been raised as regards the fact that no payments of the premiums of the policies had been received by the defendant; it being conceded that the customary credit and settling arrangements between the respective

parties and their agents and brokers were equivalent to payments, under the conditions of the policies, in so far as they may depend thereupon for their validity.

4. The first question raised on the argument relates to the scope of the agency of Tyler & Rutherford for the insured.

That they were agents authorized, by virtue of their employment, to represent the insured in all matters relating to the negotiation of the contracts, and to bind it by their representations and statements until, at least, the agency might be terminated by the final delivery of the executed policies, can not be denied. The particular extent and legal effect of this agency became material, only, in considering the branch of the defense founded on that part of the agreed statement respecting the cancelation of the policies—treating cancelation, as therein used, as the act of terminating or rescinding contracts actually in force until canceled.

From the terms of the agreed statement, it appeals that the local agent of the insurer, who was possessed of signed policies and authorized to fill the blanks, deliver them, and bind his principal thereby, regarded the policies as in force, at least, until disapproved by the company, and therefore subject to the reserved power of cancelation, nothwithstanding the conditional delivery, hereafter to be considered separately.

As regards the oral waiver of the five days' notice of cancelation, exacted of the brokers at the time of their delivery, it is not necessary to consider the effect of the express condition, in each policy, that additional stipulations, or waivers of those contained, in order to bind, shall be indorsed thereon, because the notice of cancelation, if effective as such, was in fact given more than five days before the loss occurred. The notice of cancelation was given to the brokers, and demand made of them for the return of the policies. None was given to the insured, and it had no knowledge of the fact from any source whatever.

There is nothing in the agreed statement to warrant the conclusion that the brokers' agency or employment extended any farther than the procurement of the policies. When executed and delivered—assuming for present purposes that the delivery was unconditional and complete—their agency and employment ended. Notice to them of cancelation was not the notice stipulated for in the policies, and was, therefore, ineffectual. Grace *vs.* American Central Ins. Co., 109 U. S. 278, 282.

In that case, it is true that the policy had passed into the actual possession of the insured before the notice of cancelation was given to the broker, who accepted the notice and promised the surrender of the policy; but we can not agree that this fact authorizes any limitation of the broad rule of the decision. It would be inconsistent with the general principles of the law of agency, applied in that decision, to hold, that because a policy is suffered to remain in the hands of the agent for its procurement, he thereby becomes the general agent of the insured—for that would be the necessary effect—with power to alter, to rescind, and to accept notice of cancelation and bind the insured without his knowledge or consent. To give such effect to the mere possession of the policy, after execution and delivery, would be, not only to revive a limited agency, for no reasonable purpose, but also to extend it and invest it with powers that had not previously been given. Moreover, it would be fraught with great danger to the vast interests dependent upon insurance, without any general, compensating benefit to any other interest.

Merely permitting the policies to remain for a time and uncalled for in the hands of the brokers, which is all that this record discloses, is perfectly consistent with the idea of of the termination of their agency.

With the receipt of the policy a new relation is created between the insured and the broker, namely, that of depositor and depositary; the possession of the broker becomes,

in law, the possession of the insured and nothing more; his sole duty and authority in the new relation is to deliver the policy upon demand of the insured or within a reasonable time without demand.

This brings us to the last ground of defense, the one chiefly relied on by the appellant, and upon which the decision was made to turn in the court below. The proposition—probably stated more broadly than is justified by the recitals of the agreed statement—is that the policies were not intended to take effect or become binding as completed contracts because of the express condition of their delivery to the brokers.

Now, it is quite clear that the brokers can not be regarded in any conceivable legal sense, as the agents of the insurer in this matter of delivery, and it is fair to add, there has been no such contention. On the other hand, upon principles hereinabove stated, the brokers are to be considered as the agents of the insured for all purposes connected with the negotiation and final delivery of the executed policies; and the question will, therefore, be considered as if the conditional delivery had been made direcely to the insured without their intervention.

The research of counsel has not produced a reported case in which the question of a conditional delivery of a policy of insurance, as here presented, has been determined. The case of Insurance Co. *vs.* Webster, 6 Wall. 129, cited on behalf of the appellant, can not be regarded as controlling. There, the policy was accepted from an agent in Michigan, upon a condition in writing, executed by the insured, that it should not take effect until approved by the general agent at Buffalo, New York. The premium had been paid at the time of delivery. The general agent disapproved the risk and ordered the issuing agent to return the premium and *cancel* the policy. This he failed to do, whilst engaged in an attempt to have the policy finally approved. Whilst this was going on the loss occurred. The premium was then

tendered to the insured, with notice that his application had been rejected. The court said that, from all the facts and circumstances in evidence, in connection with the authority and conduct of the two agents, it was apparent that, notwithstanding the strict letter of the executed condition of receipt, the policy was not intended to be a nullity pending the matter of its approval. Hence, as there was no notice to the insured and no tender of return of premium until after the loss, the policy was declared enforceable. In the case at bar, the premium, if charged at all to the brokers, was charged off, the risk was rejected within an apparently reasonable time, and notice was given to them while they held the policy under the condition, if that condition be available at all.

Nor are the decisions cited on behalf of the appellee any more controlling. These are: Quebec Bank, etc., *vs.* Hellman, 110 U. S. 178; Belleville Bank *vs.* Borneman, 124 Ill. 205; Merchants Ex. Bank *vs.* Luckoway, 37 Minn. 542; Benton *vs.* Martin, 52 N. Y. 570; Reynolds *vs.* Robinson, 110 N. Y. 654; Brown *vs.* American Central Ins. Co., 70 Iowa, 390; Hanickell *vs.* N. Y. Life Ins. Co., 111 N. Y. 390.

The first five of the foregoing cases need not be reviewed, for the doctrine enounced in each, so far as they bear upon the question to be decided, is to be found in a recent decision of the Supreme Court of the United States, the opinion in which reviews some of them. Burke *vs.* Dulaney, 153 U. S. 228. In that case suit was brought by the payee of a negotiable promissory note, in the usual form, against the maker. Evidence was held admissible to show that the note was delivered upon a distinct verbal agreement that it should not become operative as a note until the maker could examine the property for which it was given, and determine whether he would conclude the purchase. There was no other writing relating to the contract of purchase. The evidence did not tend, it was said, to contradict or vary a written contract, but to show that it never went into effect,

never in fact became the contract of the parties, because the condition upon which it was to become operative had not transpired.

In Brown *vs.* American Ins. Co., *supra*, the policy was not delivered to the insured, but was deposited with a third person to hold until notified of acceptance by the company. His possession was in law that of the company. Had that course been pursued in this case, there would be little difficulty.

In Hanickell *vs.* N. Y. Life Ins. Co., *supra*, the facts are peculiar.

The defendant's agent entered into negotiations with Hanickell, who was then heavily insured in other companies. He agreed to take two large policies in the New York Life, provided the agent would give certain credits upon the first premium, and procure a settlement or surrender of his existing policies, upon terms satisfactory to Hanickell. Pending the negotiations for this surrender, the agent brought the new policies to Hanickell with the notes for him to execute. The agent had no power to amend or add any condition to the policies.

Hanickell agreed to deliver his notes and to receive the policies, upon the express condition that the agent was to complete the performance of the agreement respecting the policies in the other companies.

The terms of this condition were fully expressed in writing signed by both Hanickell and the agent; but the fact was not communicated by the agent to the company. The agent failed to complete the arrangement of the old policies and declined to do so. Hanickell then returned the policies and demanded the return of his notes.

This being refused, he brought his action to compel the surrender of his notes and was awarded the relief prayed for. The court said the question was not in respect of the agent's power to modify the contract contained in the policies, but of Hanickell's right to refuse to receive them as

completed contracts, save upon the condition imposed. He could not be compelled to accept and had the right, uncontrolled by any limitations upon the agent's power, to receive the policies subject to the condition. That condition was evidenced by writing signed by both parties. Believing that the agent was acting in good faith and with the knowledge of his principal it would seem that Hanickell could scarcely have done more to protect himself from possible imposition.

The facts of that case and the character of the action distinguish it from the case at bar.

In Burke *vs.* Dulaney, *supra*, the transaction of purchase and sale was evidenced by no writing other than the simple note given in payment of the agreed consideration; and the decision was that in such case it might be shown by parol evidence that the note was delivered upon a condition precedent. In Reynolds *vs.* Robinson, 110 N. Y. 654, one of the cases cited above, it was held, in following the general doctrine of an earlier case, that the delivery of a contract for the sale of lumber might be shown to have been made upon condition. But the court said: "The rule should be cautiously applied to avoid mistake or imposition, and confined strictly to cases within its reason."

The contracts and instruments involved in those cases are very different from the policies of insurance sued upon. These are elaborate instruments and bound in stipulations and conditions. Among these, note the following, that is embraced in the general clause recited in the preliminary statement: "*This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto.*"

This and other clauses limiting the powers of agents and requiring all additional terms and conditions to be indorsed in writing upon the policies, were devised by the Insurance Company, itself, to prevent questions concerning the condi-

tions upon which its policies shall be "made and accepted" from being left to the vagueness and uncertainty of oral proof.

The general clause limiting the powers of agents to make new conditions, waivers, etc., was said by the Court of Appeals of Maryland, in a case which does not decide the question here presented, to refer "to those conditions and provisions of the policy which enter into and form a part of the contract of insurance and are essential to make it a binding contract between the parties; and which are properly designated as conditions" Franklin Fire Insurance Co. *vs.* Chicago Ice Co., 36 Md. 102, 120.

It has also been held that, where the policy contained an acknowledgment, without qualification, or additional condition changing its effect, of the receipt of the premium, it was not competent to show by oral proof that the premium had not been paid, and that the policy, for that reason, had not taken effect. Basch *vs.* Humboldt, etc., Insurance Co., 35 N. J. L. 429, 431; Consolidated Ice Co. *vs.* Cashow, 41 Md. 59, 76.

The condition in this case was one in addition to those contained in the policies and upon which they were "made and accepted," and was not in writing indorsed upon them or executed simultaneously therewith.

Our conclusion is, that by reason of the nature and terms of the policies, it is not competent to show their delivery to the insured upon a verbal condition, making their existence as contracts depend upon the subsequent ratification of another agent.

In the absence of direct and controlling authority, we think this conclusion embodies the safer rule in such cases. It prevents the uncertainty and the opportunities for controversy and imposition that would naturally follow from making the binding effect of a completely executed and delivered policy depend upon verbal conditions of delivery. And any inconveniences or hardships that might follow the

adoption of this view—beyond its enforcement in the particular case—can be readily and certainly avoided, either by the agent's indorsement of the condition on the policy, or else refusing to issue it at all before obtaining the consent of his principal.

It follows that the judgment must be reversed with costs, and the cause remanded with direction to enter judgment for the plaintiffs upon the stipulation of the agreed case. It is so ordered. Reversed.

Chief Justice Alvey dissents.

Opinion of the Majority of the Court of Appeals.

This case has been re-argued on motion granted because of the novelty and importance of the question upon which the decision had been made to turn, and in the hope that some additional authority might be found that would aid in its solution. None such has been called to our attention or developed by our own research. The propositions of the argument, which have been carefully considered, are substantially the same, though elaborated, as those upon which the cause was originally submitted. Whilst confessing that the question is one of difficulty, we see no reason to change the conclusion formerly reached, and think it unnecessary to add anything to the opinion then delivered. Readopting that opinion as expressing the views of the majority of the court, the order then made reversing the judgment and remanding the cause for entry of judgment on behalf of the plaintiffs, will be renewed.

Chief Justice Alvey dissents.

Dissenting Opinion of Chief Justice Alvey, of the Court of Appeals.

I am constrained to dissent from the majority opinion filed in this case. I can not for a moment appreciate the

reasoning upon which the judgment of the court below is reversed. I do not see that the plaintiffs, under the agreed state of facts, have the shadow of a ground for recovery on the policy of insurance upon which they have sued. A valid policy of insurance, like all other contracts, must be the result of concurring minds of the parties thereto; there must be an *aggregatic mentium*, or otherwise it is not binding.

The agreed statement of facts in this case would seem to put the question beyond all doubt, that the policies were never in fact delivered to the plaintiffs, or their agents, as completed contracts. It is agreed that Barrett, the agent of defendant, stated to Tyler & Rutherford, the brokers acting for the plaintiffs, that the proposed risk was a special hazard, and that he doubted his authority to accept it before reference to his principal, but that he would issue policies amounting to $2,000 equally divided on the buildings and machinery, upon the condition that the same should be held by Tyler & Rutherford, *and not delivered to their principals*, until the decision of the defendant company on the acceptance of the risk was duly had, and should be subject to immediate cancelation by notice that said company rejected the risk. It is also agreed that on the 27th day of April, 1895, Royce, the special agent of the defendant, known by Tyler & Rutherford to be the representative of the defendant company, having authority to inspect, confirm, or cancel risks for and in behalf of the company, went to the office of Tyler & Rutherford and informed them that the defendant company refused to carry the risk and ordered the cancelation of said policies; and on the same day the said Barrett, being on his way to the office of Tyler & Rutherford, met R. K. Tyler, a member of that firm, who had made the negotiation for the policies, had the same in his custody, and had exclusive charge of the matter, and announced to him that the company ordered their cancelation; to which the said Tyler responded, "All right; send up and get them." This was

all before the fire occurred. That the policies were ineffectural because they were incomplete contracts, was well understood and fully recognized by all the agents of both parties, who participated in the transaction.

Under such circumstances, I do not see upon what principle the insurance company can be held responsible on the policies. There is no question of estoppel involved, for the plaintiffs never knew of the existence of the policies, and therefore were never under the supposition that they were protected by them, until some time after the fire occurred on the 17th day of May, 1895. The policies came to the possession of an agent of the plaintiffs by what is admitted to be a clear mistake on the part of an accounting clerk of Tyler & Rutherford, the insurance brokers, and with no intention on the part of Tyler & Rutherford to deliver over the policies to the plaintiffs or their agents.

The law upon this subject is very clear, and may be found in most of the books that treat of the contract of insurance. In May on Insurance, Sec. 56, the result of numerous cases cited by the author is stated to be, that if there has been no payment of the premium (as in the present instance), and no delivery in fact of the policy, the contract is, *prima facie*, incomplete, and he who claims under it must show that *it was the intention of the parties* that it should be operative notwithstanding these facts. The presumption of law is, that the delivery of the policy and the payment of the premium are dependent upon each other. But this presumption may be rebutted by showing a waiver of the payment, or such other facts as go to show the *intention and understanding of both parties* that the policy shall be valid as if delivered, notwithstanding the non-payment of the premium. And an actual delivery obtained by misrepresentation, is no delivery to give effect to the contract. The mere manual possession of the policy is of little consequence, whether it be in the hands of the insurers or the insured. Its possession by the insured makes a *prima facie*

case for him, subject to be met by proof that it was *never delivered by the consent of the insurers*; while its possession by the insurers makes a *prima facie* case for them, subject to be met by proof that, though not transferred, it was intended by the parties to be a valid contract, without further action by either, and so in legal contemplation there was a delivery. This principle is exemplified by a number of cases cited by the author.

The question whether a contract has been delivered or accepted or not is always one of a preliminary character, that arises in advance of questions as to the construction of the contract itself, and most generally it is one that depends upon parol evidence for its determination. Therefore, whether an instrument sued upon, being either deed or simple contract, policy of insurance, or other written instrument, came into the hands of the plaintiff without *any absolute and final delivery* by the party sought to be charged thereby, is a question upon which parol evidence is always admissible. 1 Greenl. Ev. Sec. 284; Leppoc *vs.* National Bank of Md., 32 Md. 136, 144; Clark *vs.* Gifford, 10 Wend. 320; U. S. *vs.* Leffler, 11 Pat. 86; Couch *vs.* Mecker, 2 Conn. 302; McFarland *vs.* Sikes, 54 Conn. 250; Burke *vs.* Dulaney, 153 U. S. 228. And where an instrument is signed with an understanding that it is not to be delivered except upon the performance of a certain condition, or upon the happening of a certain event or contingency, this may be shown by parol, in avoidance of the effect of the instrument. Black *vs.* Lamb, 1 Beasley, 108; Burke *vs.* Dulaney, *supra*, and cases cited.

The contention that because the policy contains the provision that "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon, or added thereto, and no officer, agent, or other representative of the company shall have the power to waive any provision or condition of this policy except

such," etc.; therefore parol evidence is not admissible to show the circumstances under which the policies were written and placed in the hands of the insurance brokers, to be retained by them until further notice as to whether the risk was accepted; because, as contended, such evidence would vary or alter the terms and conditions of the policy, can not for a moment be supported. Such contention simply begs the whole question. It assumes that the risk has been accepted by the defendant company, and that the policies had been delivered to the plaintiffs, or their agents, as completed contracts. That is the very question in dispute. Until the policies were in fact issued and delivered, as executed contracts, the terms and conditions contained in them could have no operative effect whatever. This would seem to be well settled beyond question. Benton *vs.* Martin, 52 N. Y. 570, 574; Hanickell *vs.* N. J. Life Ins. Co., 111 N. Y. 390; Brown *vs.* Am. Cent. Ins. Co. 70 Iowa, 390.

Without adding anything more, I am, for the reasons briefly stated, decidedly of opinion that the policies sued on never attached to the property, and that the court below was right in entering judgment for the defendant on the statement of agreed facts, and that that judgment ought to be affirmed.